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Panel III Discussion: The U.S. Constitution: Reimagining "We the People" as an Inclusive Construct

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PANEL III: Discussion:

THE U.S. CONSTITUTION: Reimagining "We the People" as an Inclusive Construct

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Hyperlink to presentation: <https://www.youtube.com/watch?v=73glrTz2EDo>

TRANSCRIPTION:

Dean Joan R.M. Bullock

Good afternoon. I am Joan Bullock, Dean of Thurgood Marshall School of Law at Texas Southern University. I am the moderator of the panel discussion titled The United States Constitution: Reimagining "We the People" as an Inclusive Construct. This is the third panel of today's symposium, Police Misconduct and Qualified Immunity: Reimagining "We the People."

In our discussion today, we will be looking at the promises and the limitations of the Constitution. Many consider the Constitution a flawed document. We will not debate that here. What we will discuss is that the Constitution is a document born out of compromise. That compromise centered, for the most part, on the subject of slavery. While slavery is no longer an institution in the United States, its legacy remains, and the considerations that require the solution of compromise are still of concern today. That is because the compromise, then and now, negatively impacts the lives of African Americans and other persons of color.

Our panel members today are esteemed members of the faculty at Thurgood Marshall School of Law at Texas Southern University. Alphabetically, they are: Professor Constance Frisby Fain, who is the Earl Carl Professor of Law at Thurgood Marshall School of Law and a former practicing attorney with a Houston law firm. Professor Fain currently teaches constitutional law, torts, and medical legal liability and has written extensively for law reviews and publishing companies. Additionally, Professor Fain has been a presenter at national conferences, continuing legal education seminars, university and law school programs, and community events. Next is Professor Spearlt, who teaches evidence, professional responsibility, and criminal procedure. Professor Spearlt has taught inmates at San Quentin State Prison and is the author of *American Prisons: A Critical Primer on Culture and Conversion to Islam*. Last but not least is Larry Darnell Weeden. Professor Weeden is a prolific scholar currently teaching constitutional law and torts. A frequent

speaker at universities and law schools, Professor Weeden's scholarship over the years has covered a variety of issues that have made a significant contribution to the legal profession.

Welcome, to the panelists, and welcome, to all of the attendees.

Let's jump right into the questions. On January the 26th of this year, President Biden tweeted, "We've never fully lived up to the founding principles of this nation - to state the obvious - that all people are created equal. For too long we've allowed a narrow, cramped view of the promise of this nation to fester." President Biden is referencing the founding principles written in the Declaration of Independence, namely the God-given, inalienable rights, or the natural rights, of life, liberty, and the pursuit of happiness. The Constitution does not list these natural rights. Instead, the Constitution's Preamble provides the goal of forming a more perfect union by establishing justice, ensuring domestic tranquility, providing for the common defense, promoting the general welfare, and securing the blessings of liberty to the people and the people's posterity. I'll address this question to all of the panelists. Did the framers achieve the goal of forming a more perfect union?

Professor Larry Darnell Weeden

Good afternoon. Uh, no. We are-- it's a-- I'd like to consider it to be a work in progress. Good afternoon. I'm Professor Weeden, and today I will discuss my hope that America will soon evolve into a nation where the words "We the people" in the United States Constitution will apply equally to all of God's children: Black, White, Jew or Gentile. In this time of growing police violence against Blacks and other people of color, it is helpful, I think, to remember that the Equal Protection Clause of the 14th Amendment of the United States Constitution guarantees that all persons similarly situated should all be treated the same. And now, the Equal Protection Clause promise - and I'm having some problem with my technology here, but - oh, that, that all persons should be treated the same--[inaudible], though I'm seen reading it from the screen that I have that the--let me repeat. But it is helpful to remember that the Equal Protection Clause of the United States Constitution guarantees that all people similarly situated should be treated the same.

Dean Joan R.M. Bullock

We will go back to you. I understand technological issues. Professor Spearlt?

Professor Larry Darnell Weeden

Oh, thank you.

Professor Spearlt

Great. Thank you. It's great to be here. It's really an honor and a privilege to be able to share some of my ideas and my findings in my own research. And I want to thank everyone for putting this together, and our earlier panelists. There were some really great presentations earlier. It was great to see Dean Bledsoe and to see Professor Howard Henderson, among others. Now, today, as we are thinking about the Fourth Amendment and qualified immunity for police, it's also worth thinking about state agents more broadly. And then what I would like to do is to get us-- and let me share my screen here. And-- oh, I am disabled from sharing my screen [laughter]. Okay, maybe

that can be abled by the moderator. But I want us to be thinking about this in the prison context, right, including the question, "Well, who polices the police in prison?" That is the question I want to talk about today. Who is it that's policing the police, the correctional officers, in prison? So, we all know from the horrific events, that occurred over the summer with George Floyd that the Black Lives Matter Movement really took off. Not just in the United States but all over the world we saw a proliferation, an outpouring, of people taking to the streets to protest, which somewhat signaled that Black lives were devalued globally. Right? So, it wasn't just our country that was having this issue, but people were being mistreated by police globally. And that was--- so the Black Lives Matter slogan took off all over the world. And so not only in our country, not only, all over the world.

But we also need to think about prisons as well, which often get forgotten. And I try to argue that, you know, when we think about the Fourth Amendment, it's pretty much anything goes in prison. There is no real right to privacy in prison. Search and seizure is pretty much a permanent thing that goes on in prison. But I would try to make the argue that the turn to mass incarceration is one of the biggest indicators that Black lives do not matter or at least they matter less than the rest of the population. If you think about just the millions in the last decade that have been locked up, the families that have been left behind, and just the disparity in numbers. In 2018, African Americans made up, 12% of the American population but 33% of all people in prison. Right? So just to get a sense of how life is being devalued. In prison you can expect a lower life expectancy as well. So, we're talking about Black lives, and so we're talking about, research that suggests for every year spent in prison reduces your life expectancy by two years. Right?

Dean Joan R.M. Bullock

You are able to share your screen now if you want.

Professor SpearIt

Excellent. All right. And so let me get to where we are, life expectancy behind bars and what that is. But there's also, just now, to think about, "Well, what about the police on the street and the police in prison? What is actually worse?" Right, and if we think about what happens in prison, we have all sorts of stories that we hear, and there's documentation. And what I would like to suggest is that if we think that police on the outside are behaving in these, you know, egregious ways and this misconduct, this is just the tip of the iceberg. We need to really explore what's happening behind bars. And I would suggest that what happens behind bars is far worse because we don't have witnesses; we don't have video cameras recording; we don't have people taping what's happening. So, what can happen behind bars, is much more brutal because there are easier ways of hiding it. You talk about, you know-- I've heard prisoners talk about being put with helmets on their head so they can hide some of the wounds and some of the, you know-- the physical trauma, getting flashlight therapies so that they're hit with blunt instruments that don't leave bone damage, etc. And so, this is an opportunity for us to really be thinking about the police in prison, and what I would like to say is that you see undervaluation across the board.

In this first image you see, at pointblank range, you know, a correctional officer firing tear gas at a group of individuals. Above that you see how individuals on suicide watch can be wrapped up

with, you know, masks and hoods and covering. Mos Def, in the middle picture, was most famous for showing all the horrors and trauma that go on with forced feeding. And this forced feeding wasn't just at Guantanamo Bay but happened across the country. There are forced feedings of individuals in prison who go on hunger strike. And so, we see all these different ways where it's not just the fact of being in prison and the life expectancy issues, but the treatment, itself. And of course, we have George Stinney, who represents the youngest person ever executed by our criminal justice system. He was killed at the age of 14. Right, so there's so much to discuss when it comes to prison. But in the interest of time, let me, just proceed to give further evidence of the distinction between Black lives and non-Black lives in this country, because I think you really see it evident.

So, this picture on the left is actually from a Facebook posting that I made, because I was stunned to see police officers pretty much begging the rioters to leave the Congressional Building. Right? And this, it's so stunning because, you know, you try to flip the script and imagine, "What would it have been like if you had a bunch of armed Black men, you know, storming the Capitol like that? You know, would there be any pleading at all, or would it just be gunshots fired? Would it just be batons flying all over the place?" And so, again, when we talk about Black Lives Matter and the distinction, this is what I'm trying to juxtapose. The treatment of an individual with a Confederate flag walking through the Capitol Building untouched, unharmed by police officers, yet in the bottom picture we see the response that can happen when it's protesting around Black issues or predominantly Black protesting crowds. They were armed to the teeth. It looked like people were ready to go to war when it came to the George Floyd protests. And so, here, these individuals storm the Capitol, kill a police officer, destroy the building, and George Floyd passed a \$20 bill. Just to understand how differently police can treat individuals when they want.

So Black Lives Matter and, you know, the Black Lives Matter Movement, which is forcing us to look at the accountability of police officers on the street-- that police behavior lives in the shadows of what happens inside prison walls. Right? So, I want to make that very clear. And I think it's appropriate, now that we've started Black History Month, to be thinking about not just police on the street but police in prison because this, unfortunately, is a sad part of Black history in America. So, when we think about suffering and death for Black communities, we have to look at prisons as ground zero for this struggle, because this is public enemy number one for Black communities.

Finally, I'll end with this little, piece of poetry that I find very telling. All right, so when we're trying to understand why people say Black Lives Matter-- well, because when we said "All," it didn't include us. And so, I would argue the same. When we talk about "We the people," it's far from given who "we" is, right? And it justifies what we are doing here today questioning this reality about who is included. Who does "We the people" mean? So hopefully this will lead to inspiration and lead us to search for solutions to better this situation. Thank you.

Dean Joan R.M. Bullock

Thank you, Professor Spearlt. I think that's, that's a good jumping-off point in bringing to the fore the issue of persons being distinguished, or people being distinguished such that, when the Constitution was drafted and originally enacted, the "We the People" did not include Blacks, also

did not include Native Americans. And so, looking at the Constitution as a social contract between parties. And the Constitution as a contract, like any other contract, requires a meeting of the minds and a bargain for exchange, and the phrase in the Constitution's Preamble, "In order to form a more perfect union," points to the need to have bargain for exchange, a compromise exacted to ensure the Constitution would be enacted and ratified by the states. Professor Spearlt, you can stop sharing your screen right now.

Professor Larry Darnell Weeden

I have returned. I'm ready. I think I've resolved my, technology question.

Good afternoon. I'm Weeden. Today I'll discuss my hope that America will soon evolve into a nation where the words "We the People" in the United States Constitution will apply equally to all of God's children: Black, White, Jew or Gentile. In this time of growing police violence against Blacks and other people of color, it is helpful to remember that the Equal Protection Clause of the 14th Amendment to the US Constitution guarantees that all persons similarly situated should be treated the same. The Equal Protection Clause promised for equal protection of the law to all people. It is a promise made, but it is very often a promise not kept when it comes to police misconduct toward Black people. Although the Supreme Court has all too often breached the promise of the Equal Protection Clause by tolerating the "separate but equal" laws that promoted and protected Jim Crow racial segregation in the South. Let me make it clear that I have faith in the US Constitution. My faith in the US Constitution is similar to that of former Congresswoman Barbara Jordan, TSU.

On July 25th, 1974, in a speech to the House and Judiciary Committee, Jordan said, "Earlier today the beginning of the Preamble to the Constitution of the United States, 'We the people,' is a very eloquent beginning, but when the document was completed on the 17th of September 1787, I was not included in that 'We the people,'" Jordan said. Barbara Jordan, for many years, she believed in George Washington and Alexander Hamilton may have left her out of "We the people" by mistake. It was not George Washington and Alexander Hamilton who did not include Blacks in the concept of "We the people;" it was the United States Supreme Court in its shameful [*Dred Scott*](#)¹ decision that decided that Black people were not part of "We the people." Before the Civil War, in 1857, the *Dred Scott* decision, which promoted race-based slavery of African Americans, the Supreme Court concluded that any constitutional protections connected to the phrase "We the people of the United States" were for the benefit of White people only. Through the process of amending the Constitution, subsequent court decisions, Barbara Jordan concluded that she had finally been included in "We the people."

Although-- I agree that Black people have finally been included in the Constitution's reference to "We the people," but in my opinion Black people have not been treated equally under laws covering "We the people" of the US. Although I have faith in the United States Constitution, it should be a self-evident truth by now that a failure to hold police officers accountable for their police violence against Black people in America represents a fundamental rejection of the Constitution's grant of the equal protection of the law to Black people. Because unlawful police

¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

violence against Blacks and other people of color is a rejection of an inclusive constitution, I'm going to speak out against race-based police violence.

"What is police violence?" is a fair question to raise. Even those among us who may not be able to legally define police violence know it when we see it. Police violence may be defined as a civil rights violation where law enforcement officers exercise undue or excessive force against the other person. This includes what is not unlimited to booing, physical or verbal harassment. The number of fatal police shootings in the US are increasing. Sadly, the chain of fatal police shootings in the US seems only to be increasing, but additionally, the rate of fatal police shootings among Black Americans was much higher than that for any other people group. For eight minutes and 46 seconds², Derek Chauvin pressed his knee into the neck of George Floyd, an unarmed Black man. This deadly use of force of the now former Minneapolis police officer has energized a very great debate about police violence and racism.

Mark Hoekstra, the economist at Texas A&M University, has attempted to decipher the released officer's use of force by comparing responses to emergency calls. Based on intimation from more than two million 9-1-1 calls in cities, he concluded that White officers dispatched to Black neighborhoods fired their guns five times more often than a Black officer dispatched with similar calls in the same neighborhood.

Dean Joan R.M. Bullock

Well, thank you, Law Professor-- Because we want to get to some of the questions that, have been raised already by what has been presented. And one person has asked the question, "Is the oppression of minorities via mass incarceration a function of the current economic system - that is, capitalism - or the denial of constitutional rights in the United States?"

Professor Larry Darnell Weeden

That question, my response to it is an ongoing indication of systemic racism. And what happens when you have something like Covid or an unusual sit-- it just brings and highlights the underlying disproportionate effects of racism in our society, and it's just kind of undercover; we don't pay as much attention to it until there's an economic crisis. But currently, it always exists----on a continued basis, unfortunately.

Dean Joan R.M. Bullock

Thank you, Professor Weeden. Professor Fain, what are your thoughts on this? Is the oppression of minorities a function of the economic system, or is it a denial of the constitutional rights in the United States?

Professor Constance Fain

I think it's the-- well, I feel it's the denial of, equal protection, because, as we know with the 14th Amendment, and we've heard about that, and all persons, all persons, should be accorded the equal protection of the laws. And this is not being done, by our government, and it's a violation of civil

² We now know it was actually 9 minutes 29 seconds from trial testimony.

rights and, the private industry, economically, of course were impacted by the discrimination. And historically, it has, we know it's always been here. So, I feel like it's both, but the big thing to me is that we are not accorded, all persons are not accorded, the equal protection of the laws. And specifically for African Americans, the Equal Protection Clause, it was passed to address the violation of, to provide equal protection for the newly freed slaves. That's what it was supposed to do, and it has not really done that. And, although it started that way for African Americans, many other groups are included. Which I don't have a problem with including other groups. But that is why it was created, so, we're-- that was one of the main reasons for creating it, so. I don't feel like that is being done; it hasn't been done over all these years, which has led to, of course, our many [health?] problems.

Dean Joan R.M. Bullock

Well, let me throw out, after we started, that the Constitution, is a document of compromise, compromise, even though the founders or the, the founding fathers had the principles, as stated in the Declaration of Independence, that all people are created equal. The Constitution itself, was crafted out of a need for compromise in order to create that more perfect union, where we're dealing with imperfect people. And how to create a perfect document when we're dealing with imperfect people. And I think we all realize that there is an-- impossible to create a perfect document by which an imperfect people would be subject to live. So, there is a compromise. And I was mentioning before about the Constitution, viewing it as a contract, a social contract. And for those of us who've all taken contract law, we know that there needs to be a meeting of the mind. We know that there also needs to be a bargain for exchange. And so, the phrase in the Constitution's Preamble, which says "In order to create a more perfect union," it points to that need to have that bargain for exchange, a compromise exacted, to ensure the Constitution would be enacted and ratified by the various states at the time.

So, in response to the question asked by the attendee about the oppression of minorities, "Is it a function of the current economic system, or is it a denial of constitutional rights?" Are we not talking about two sides of the same coin, where there has to be a denial of constitutional rights in order to advance a certain economic system? Isn't that the intention that the founding fathers had when they created this document? How do you bring all the people who are living in the various territories together so that they can agree to this one document? And as we look at the history of the Constitution and all of the amendments, isn't that what is going on, a back-and-forth, a sense of compromise? So, for example, what are some of the compromises that you can comment on, the bargain for exchanges, that, from the time of the drafting of the Constitution and enactment of the Constitution to the present day, what compromises can you point to that, by showing how the Constitution came into being, shows exactly, now, as to where we are today and, [summing?] through how Professor Spearlt was able to show, that there is still a continued devaluation or undervaluation, I should say, of certain persons in order to allow for a certain level of status quo?

Professor Spearlt

I would love to just, begin with that. When you talk about compromise, earlier you had mentioned slavery as an institution no longer being with us. Well, the 13th Amendment, I look at as a

tremendous compromise, right, because we tend to think that the 13th Amendment was the amendment to abolish slavery, but it did no such thing at all. What it did was to constitutionalize slavery and make it applicable to individuals convicted of a crime. So, what happened is that we didn't abolish slavery; we just changed who it was that could own slaves. And now we changed ownership from private ownership to the state being able to own slaves. That's why, in Virginia, they called prisoners slaves of the state. So that was a huge compromise because soon after prisons-- soon after the, the 13th Amendment was passed, we saw African Americans being rounded up into the prison system in huge numbers and then turning around and being leased out to the plantations. And some, you had the situation where some individuals were back at the plantation where they were, once, as slaves, now working as prisoners. So, the incarceration system starts, for African Americans, intimately, at that point.

And it's been with us as a money-making venture ever since then, even to the present, where you have private prisons that make money off the fact that people are in prison. And so, people call this the neo form of slavery, neo-slavery, because now we don't need anybody working in fields or doing manual labor to generate money from stakeholders; we just need a warm body in prison, and that warm body generates a check from the state into private industries. And so, this is how we're buying and selling bodies today, commodifying through this new form of neo-slavery. And it's so egregious that you could have a warden who owns stock in the very company that is housing people for prisons. So, the profit motive is definitely a part of what we're seeing in prisons.

But let me just conclude by saying even prior to the development of private prisons, prisons, themselves, were highly privatized. They're-- you know, the outgoing phone calls were always collect; the cable services, mental health services, medical services, all of that had been privatized well before it went full-blown private prisons. So, again, we can see the connection all the way from the plantation leasing system to, now, private prisons that show a continuum of using, African Americans to support this institution.

Larry Taylor

Dean, Dean Bullock, I wanted to ask, Professor Fain a question to that same point. You guys actually beat me to the punch on the 13th Amendment. Professor Fain, there's been lots of discussions about prisons and privatization of prisons with this new administration. What are some of the things that professors and those in the legal community can do to help this administration understand the constitutional, evils that are involved with the 13th Amendment and the use of prisons?

Professor Constance Fain

Well, I guess as far as-- I consider that to still be a form of slavery, as well. Just like, the fact that, even though we've integrated schools. Schools have integrated--and they're really still segregated. And so, as far as the workers-- and they're working, and they're not being-- I'm not aware of whether there's anything that's given to them from some reading that I've done, but it's been a while. They're not paid, to do the work that they're doing in wherever, wherever they're being used. So as far as us, as attorneys-- and you're talking about law professors and what they can do. Well, one thing we're doing is we are having these various, like the symposium, the seminars, where we

can bring scholars together and, and others, practitioners and whatever. And then they can speak on these issues and then make suggestions on some things that can be done. And also, in the law schools we're teaching our students. Of course, what we're teaching has to be relevant to the sub-- the topic-- I mean the courses that we teach, the topics that we teach. And we can do something in that manner, even through the clinics, at the clinic at the law school, and training the students. Many students do want to go out, and they want to help to make changes. I've talked with them, and they-- as others have, and they want to make changes, working with the Earl Carl Institute. And a lot, a great deal, is being done there. They work with the prisons and the rights of prisoners and various things that have to do with people who have gone to prison. And illegal-- I mean where they've gone to prison, but then they found out that they did not commit the crimes. And then, of course, the Innocence Project and that kind of thing. And then, of course work is being done there.

So, we have the students at the school that are interested, and they can go out, and they can practice in these areas, that would help. We, as professors, any that do practice, can do some things. We have Professor Spearlt. This is what he does and has done in the past. The writings, that we do, the scholarship, that's another way that you can get information out. Because it appears that, the articles that seem to be more favored now, especially from talking to the Clinic professors, are those practical ones rather than going on and on and on about the philosophies of the judges and all of those things. They want to see some practical kind of things that can be done. And just things like that. Those are some of the things that maybe we can do to get people out there to work. And, of course, our people are also-- they are-- we have public-- but we have our politicians, and we have many, many that have graduated from the school that hold positions in Congress. As heads of, we have mayors; we have people like that, and they're in the legislature of the states and that kind of thing. And then, through them, maybe something could be done to help make a change.

And with the Biden administration, it appears that he is certain-- trying to make a-- is making an effort to make things more equitable so that they're fair. Because he's very concerned about it, because he's even doing that with this Covid vaccine, where there is a lot of articles that were written about the disparities that's occurring with the distribution of the vaccine. This-- it's just a lot of-- I don't know too much but I'm just thinking maybe there are things like that that we can do.

Larry Taylor

Thank you. Thank you, Professor Fain. And, as we close out on this particular discussion, thank you, Dean Bullock, Professor Weeden, Professor Fain, Professor Spearlt. This has been a very insightful discussion. To our attendees, you are welcome to go into this particular, section and pull up some of the articles, that these esteemed professors have written, at this esteemed university. And please feel free to continue to post questions. We will get those to the participants and hopefully have those answers for you, later on the site.

Dean Joan R.M. Bullock

Thank you. Well, I will just end with the quote from Martin Luther King, who said, "Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless." And what I want us to -- as the takeaway is that whatever the rule

is as it relates to the meeting of the minds must be of one set that applies equally to all and that the heartless, those who govern by rules which they would not prescribe for themselves, must be restrained in that situation. And if we do, at least, restrain the heartless-- we might not be able to change the minds and the hearts of everyone, but if we can restrain the heartless and have everyone under one set of rules, we will indeed be a people that are equal under the law.